Petition

81-1980

No.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1981

ARTHUR TREACHER'S FISH & CHIPS, INC. and MRS. PAUL'S KITCHENS, INC.,

Petitioners,

v.

KENNETH L. HORSTMYER and MADELEINE S. HORSTMYER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Article III, Section 2 of the United States Constitution strictly limits jurisdiction of federal courts to actual "cases" or "controversies". Recognizing the inherent risk of allowing federal courts to render decisions on abstract questions, the historic doctrine of ripeness deprives federal courts of jurisdiction to render advisory opinions on hypothetical facts. As a matter of constitutional imperative, the Federal Declaratory Judgment Act does not effect the case or controversy requirement. The Act creates a procedural remedy only; it does not provide an independent basis for jurisdiction. Thus, a matter must be constitutionally ripe for adjudication before declaratory relief may be entered.

Ripeness, a prerequisite to Article III, Section 2 jurisdiction, plays a particularly significant role in the area of pension type cases. Crowded dockets, as well as the unlimited number of potential plaintiffs, dictate that beneficiaries of pension-type benefits be precluded from seeking a declaration of their future rights to deferred compensation prior to fulfilling all conditions precedent to receipt of the benefits. The premature declaration of an individual beneficiary's future pension rights, as in the instant case, is a classic example of the improper use of the Declaratory Judgment Act to create subject matter jurisdiction. Therefore, the question presented for review is:

> Did the United States District Court for the Eastern District of Pennsylvania have jurisdiction to declare a party's contingent future right to retirement benefits when the asserted contractual claim admittedly could not mature, if at all, until three years subsequent to the filing of the Complaint?

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United States Constitution:

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OPINIONS BELOW

The Order entered without opinion by the United States Court of Appeals for the Third Circuit, which is not yet officially reported, is printed in the Appendix at A1-A3. The opinions of the United States District Court for the Eastern District of Pennsylvania, which are not officially reported, are printed in the Appendix at A6 through A41.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was dated and entered on February 12, 1982. (App. A42). The Court of Appeals denied Petitioners' timely Petition for Rehearing En Banc in an Order dated March 17, 1982. (App. A45-A46).

Petitioners invoke the jurisdiction of this Court under and pursuant to 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, Section 2 of the Constitution of the United States:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Federal Declaratory Judgment Act, 28 U. S. C. § 2201:

> In a case of actual controversy within its jurisdiction . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

On March 1, 1980, Arthur Treacher's Fish & Chips, Inc. ("Arthur Treacher's") entered into an employment agreement with Kenneth L. Horstmyer. Pursuant to this agreement, Mr. Horstmyer agreed to serve as President of Arthur Treacher's from March 2, 1980 to November 13, 1983, at an annual salary on One Hundred Thousand Dollars ($100,000.00). In addition to his annual salary, Arthur Treacher's agreed to pay Mr. Horstmyer Fifty Thousand Dollars ($50,000.00) annually in "deferred compensation" for his life, or that of his wife if she survived him, beginning November 13, 1983, Mr. Horstmyer's sixty-second birthday. (App. A26-A27). Mrs. Paul's Kitchens, Inc. ("Mrs. Paul's") guaranteed payment of these retirement benefits. (App. A26).

On September 2, 1980, following the termination of his initial term of employment, Mr. Horstmyer and his wife, Madeleine, brought a diversity action against Arthur Treacher's and Mrs. Paul's seeking over one million dollars ($1,000,000.00) in damages for the alleged repudiation of the deferred compensation provisions of the employment agreement. Petitioners moved for summary judgment on the basis that the court lacked subject matter jurisdiction since the Horstmyers' claims would mature, if at all, only in November 1983. The District Court granted summary judgment and dismissed the Complaint on January 15, 1981, finding that the claim was not ripe for adjudication. (App. A4-A5).

Notwithstanding its specific finding that the Horstmyers' claim remained contingent and not ripe for adjudication, the district court *sua sponte* invited them to file an amended complaint for declaratory relief. (App. A4, A11). At the court's invitation, the Horstmyers filed an amended complaint seeking a premature declaration that

Arthur Treacher's and Mrs. Paul's would be obligated to pay deferred compensation in November 1983, if the Horstmyers in fact survived until that date. Arthur Treacher's and Mrs. Paul's immediately moved to dismiss plaintiffs' amended complaint. While reaffirming its prior holding that the Horstmyers' claim remained contingent, the District Court nevertheless denied the Motion to Dismiss concluding that "the possibility that defendants may never be called upon to fulfill their contractual obligations . . . is not a reason to deny plaintiffs the opportunity to obtain a declaratory judgment." (App. A17).

Thus, despite the admitted hypothetical nature of plaintiffs' claim, the District Court entered judgment after trial for the Horstmyers on Count II of their amended complaint, which sought "a declaration that the Horstmyers *are entitled* to receive the deferred compensation payments" and that Arthur Treacher's and Mrs. Paul's "*are required* to make deferred compensation payments. . . ." (App. A20-A21).

Arthur Treacher's and Mrs. Paul's timely appealed the District Court's entry of declaratory relief and the Horstmyers cross-appealed from the entry of summary judgment dismissing their original complaint. In a contradictory decision, the Court of Appeals, without opinion, affirmed *both* the District Court's dismissal of the original complaint as not ripe and its entry of declaratory relief. (App. A1-A3). The Third Circuit thus affirmed both the lower court's finding that the Horstmyers' claims for damages were not ripe for adjudication under Article III and its inconsistent holding that the court nevertheless had jurisdiction under the Declaratory Judgment Act to declare the Horstmyers' future rights to pension benefits. Because of the inconsistency in this decision, Arthur Treacher's and Mrs. Paul's filed a Petition for Rehearing En Banc, which was denied on March 17, 1982. (App. A45-A46).

REASONS FOR GRANTING THE WRIT

A. The Decision Below Raises a Question of Exceptional Importance Concerning the Constitutional Limitations on Subject Matter Jurisdiction in the Federal Courts

The exercise of federal judicial power under Article III of the Constitution requires an actual, immediate controversy between the parties. Federal courts are without "power to issue advisory opinions . . . or to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U. S. 244, 246 (1971). Jurisdiction of a federal court is dependent upon "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 241 (1937) quoted in *Preiser v. Newkirk*, 422 U. S. 395, 401 (1975).

As mandated by Article III, the Federal Declaratory Judgment Act, 28 U. S. C. § 2201, authorizes declaratory relief only in "a case of actual controversy." The Act is a procedural device that creates a remedy only; it does not create a basis for jurisdiction or authorize the rendering of advisory opinions. *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, 241 (1937). A case is constitutionally ripe for adjudication under the Declaratory Judgment Act only where "[a] declaration on rights as they stand [is] sought, not on rights which may arise in the future." *In Re Summers*, 325 U. S. 561, 567 (1945).

This fundamental constitutional principle, namely, that the Declaratory Judgment Act *does not* create subject matter jurisdiction, was violated by the district court and the Third Circuit in their contradictory rulings that a present claim for future deferred compensation benefits

was not "ripe" in an action for damages, but did present a case or controversy under the Declaratory Judgment Act.

The Third Circuit's holding that a beneficiary may seek declaration of his pension rights which accrue only *if* he should survive to retirement age, is not only constitutionally infirm, but invites literally thousands of similar premature claims. Under the holding of the Third Circuit, beneficiaries who have not fulfilled the conditions precedent to receipt of pension benefits, but desire for whatever reason to clarify their unmatured pension rights, may seek such a declaration in the federal courts.

Judicial abuse of the Declaratory Judgment Act in the instant case to create subject matter jurisdiction presents this Court with a clear cut opportunity to eliminate unnecessary judicial involvement in pension disputes and to foreclose the rendering of advisory opinions under the rubric of the Declaratory Judgment Act. Crowded dockets and the resulting judicial delays dictate that this Court seize this opportunity to firmly assert the constitutional limitations on jurisdiction contained in the case or controvesry requirement of Article III.

B. There Is a Conflict Between the Circuits on Use of the Declaratory Judgment Act to Render Advisory Opinions on Retirement or Pension Benefits

The Third Circuit's holding that a litigant may receive a declaratory judgment regarding future and contingent deferred compensation rights stands in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Stewart v. M. M. & P. Pension Plan*, 608 F. 2d 776 (9th Cir. 1979). In *Stewart*, the plaintiff-appellant sought a declaration of his rights under a pension plan prior to his retirement. Affirming the lower court's dismissal of plaintiff's suit, the Ninth Circuit emphasized that a threshold requirement to an action under the Declaratory Judgment

Act is the existence of a case or controversy: "Whenever a declaratory judgment is sought in federal court, there must be an 'actual controversy' before there can be jurisdiction." 608 F. 2d 784-85. The Ninth Circuit concluded that since the plaintiff was not presently being denied any benefits, since he was not presently suffering any injury, and since certain future contingencies could affect his status under the pension plan, no constitutionally cognizable case or controversy existed: "In essence, what Stewart sought was an advisory opinion for possible use in the future when, as, and if, he retires. . . ." 608 F. 2d at 785.

In the case at hand, the Third Circuit, confronted with a virtually identical suit for declaratory relief on future contingent retirement benefits, reached the contrary result. Here, the Horstmyers' admitted that they were entitled to deferred compensation payments, if at all, only on November 13, 1983, some three years after the complaint was filed. They admitted that their claim was contingent on their survival until November 1983, and they made no allegation of any present entitlement or injury to their future contingent rights.

Nevertheless, the Horstmyers sought and obtained that which is constitutionally forbidden: a speculative declaration of rights based on the hypothetical survival of the Horstmyers until November 13, 1983. In essence, what plaintiffs received "was an advisory opinion for possible use in the future when, as, and if" they survive until November 1983. *Stewart v. M. M. & P. Pension Plan*, 608 F. 2d at 785. Clearly, the Third Circuit improperly affirmed the invocation of the Declaratory Judgment Act to create jurisdiction, an error which is underscored by its contradictory affirmance of the dismissal of plaintiffs' suit for damages on ripeness grounds.

The conflict in the Circuits between the instant case and the Ninth Circuit's decision in *Stewart v. M. M. & P. Pension Plan,* should be resolved by this Court to halt the uncontrollable expansion of federal court jurisdiction implied in the Third Circuit's holding that potential beneficiaries of future contingent pension benefits may bring actions under the Federal Declaratory Judgment Act for advisory opinions on their rights "if, as, and when" they reach retirement age. 608 F. 2d at 785.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2069 & 81-2070

KENNETH L. HORSTMYER and MADELEINE S. HORSTMYER,

v.

ARTHUR TREACHER'S FISH & CHIPS, INC.

and

MRS. PAUL'S KITCHENS, INC.,

Arthur Treacher's Fish & Chips, Inc. and Mrs. Paul's Kitchens, Inc.
Appellants in No. 81-2069

Kenneth L. Horstmyer and Madeleine S. Horstmyer,
Appellants in No. 81-2070

(D. C. Civil No. 80-3443)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 4, 1982

Before: GIBBONS, WEIS and GARTH, *Circuit Judges*

JOHN M. ELLIOTT, ESQUIRE
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Attorneys for Kenneth L. Horstmyer and Madeleine S. Horstmyer

JUDGMENT ORDER

Arthur Treacher's Fish & Chips, Inc. and Mrs. Paul's Kitchens, Inc. appeal from a judgment granting Kenneth L. Horstmyer and Madeleine S. Horstmyer a declaratory judgment that they are entitled in the future to the deferred compensation provided for in a contract between Mr. Horstmyer and Arthur Treacher's Fish & Chips, Inc. They also appeal from the dismissal of their counterclaim for damages for fraud, breach of contract and breach of fiduciary duties. The Horstmyers' cross appeal contended that the court erred in denying recovery for the present value of deferred compensation on a theory of anticipatory repudiation. We find no error.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs to be taxed in favor of the appellee in each appeal.

By THE COURT,

/s/ JOHN J. GIBBONS
Circuit Judge

Attest
/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

Dated: FEB 12 1982

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 80-3443

KENNETH L. HORSTMYER and
MADELEINE S. HORSTMYER

v.

ARTHUR TREACHER'S FISH & CHIPS, INC. and
MRS. PAUL'S KITCHENS, INC.

ORDER

(Filed Jan. 15, 1981)

AND NOW, to wit, this 15th day of January, 1981, it is hereby Ordered that:

1. Defendant's Motion for Summary Judgment on the issue of deferred compensation is granted without prejudice to plaintiffs' right to renew their claim when it becomes ripe on November 13, 1983.

2. The Court hereby grants plaintiffs leave to amend their complaint to afford them an opportunity to state a cause of action in compliance with the provisions of the Declaratory Judgment Act within ten (10) days. Plaintiffs are directed to include therein specific claims for any present damages which they claim, such as lost wages or reimbursement of expenses, if any.

3. Defendants shall have ten (10) days from the filing of said amended complaint in which to answer.

4. Because the Court finds that adequate time has been available for discovery, that extensive additional

discovery is unnecessary, and that discovery to date has been burdensome to plaintiff in contravention of the intended functioning of the Federal Rules, discovery will be allowed for twenty (20) days following the filing of defendants' answer under the following terms:

(a) All additional discovery must relate to issues raised by the amended complaint. Duplicate discovery will not be permitted.

(b) Each discovery request must be approved by this Court.

(c) Each request for additional discovery must show in an attached memorandum why it is necessary at this stage of the proceedings and in what way it explores new issues raised by the amended complaint.

(d) Responses and oppositions to discovery requests shall be filed within two days of service of each request to which they pertain.

5. Defendants are Ordered to produce documents upon which they rely for proof of damages asserted in their counterclaims within five days of this Order. Plaintiff's Motion to Regulate Proof at Trial is DENIED.

6. Counsel shall comply with Local Rule of Procedure 21 and this Court's Standard Pretrial Procedure.

7. Trial shall be scheduled to be held on March 2, 1981, commencing at 9:30 o'clock a.m.

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

1-15-81

BENCH OPINION

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 80-3443

KENNETH L. HORSTMYER and
MADELEINE S. HORSTMYER,
Plaintiffs

v.

ARTHUR TREACHER'S FISH & CHIPS, INC.
and
MRS. PAUL'S KITCHENS, INC.,
Defendants

Philadelphia, Pa., January 15, 1981

Before: HON. CLARENCE J. NEWCOMER, *J.*

SECOND DAY

APPEARANCES:

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and
PAUL J. BERNARDO, ESQUIRE
Attorneys for Plaintiffs

JOHN M. ELLIOTT, ESQUIRE
STEVEN C. BRAVERMAN, ESQUIRE
and
WILLIAM C. FIELDS, ESQUIRE
Attorneys for Defendants

THE COURT: In the matter of Horstmyer, et al. versus Arthur Treacher's, et al., before this Court is a Motion for Summary Judgment filed by defendants three days ago. The Court has considered the memoranda submitted by counsel, and arguments presented in a hearing held yesterday.

Although certain factual issues are vehemently disputed in this case, the facts material to the instant motion are uncontested.

The defendant Arthur Treacher's Fish & Chips, Inc. ("Arthur Treacher's") is a Delaware corporation with its main offices in Philadelphia. It is a wholly owned subsidiary of Mrs. Paul's Kitchens, Inc. ("Mrs. Paul's"), which is a Pennsylvania corporation with its main offices in Philadelphia.

Plaintiffs Kenneth Horstmyer entered into a written agreement of employment with Arthur Treacher's on March 1, 1980. Paragraph four of that agreement states in relevant part:

> Following the Initial Term and at such time as your Regular Employment . . . ceases, Treacher's agrees to pay you (meaning plaintiff) by way of Deferred Compensation, amounts totalling Fifty Thousand Dollars per year, payable bi-weekly. The fees provided for in this Paragraph four shall continue for and during your lifetime and that of your spouse, Mrs. Madeleine Horstmyer, should she survive you. Mrs. Paul's Kitchens, Inc. hereby guarantees all such deferred compensation amounts provided for in this Paragraph four.

Paragraph five of the agreement states:

> Either party may terminate the Regular Employment provided for under this letter at any time. In the event you voluntarily terminate such Regular

> Employment before November 13, 1983, you shall not be entitled to any further salary as provided for in Paragraph three of this letter, nor to any Deferred Compensation as provided for in Paragraph four of this letter. In the event your Regular Employment provided for under this letter is terminated by us or in the event of your total physical or mental disability, which disability shall continue for a period of more than three (3) consecutive months, rendering you unable to perform your duties hereunder, or in the event of your death, during the Initial Term hereof, no further salary shall be payable to you as provided for in Paragraph three hereof, provided, however, you shall (or in the event of your death, Mrs. Madeleine Horstmyer shall) be entitled to receive those Deferred Compensation payments provided for in Paragraph four above.

The "Initial Term" referred to in these paragraphs is the period from March 2, 1980 to November 13, 1983.

On July 31, 1980 Mr. Horstmyer's employment contract with Arthur Treacher's was terminated. The parties disagree as to whether or not Mr. Horstmyer was fired. The most significant portion of this suit is based on Mr. Horstmyer's contention that he was fired and that officers of Mrs. Paul's have told him that the company would not pay plaintiffs the deferred compensation described in Paragraph four of the Agreement of March 1, 1980. Plaintiff asserts that this amounts to repudiation of defendants' contractual obligations; that defendant is therefore now in breach of the contract, and that plaintiff is now entitled to compensation under the contract.

Defendant denies that plaintiff was fired, and offers various other defenses, such as fraud, in the inducement, and counterclaims such as fraud and libel.

The Court notes, parenthetically, that plaintiff is also claiming damages in the amount of one day's wages, which he says are unpaid and due him.

Defendants' legal argument is basically twofold. First, as a matter of law, he contends that there have been inadequate allegations of "repudiation" to sustain plaintiff's theory of anticipatory breach.

Second, regardless of the Court's ruling on that issue, defendant argues that as a matter of Pennsylvania law, there can be no anticipatory breach of a unilateral contract to pay sums of money at sometime in the future. Defendant asserts that the rule is black letter law and dispositive of this case.

The parties have not supplied the Court with any clear authority of Pennsylvania law that would dictate the results under the peculiar circumstances of this case. Assuming, arguendo, that there has been a repudiation in this case, the first issue is whether or not plaintiff is entitled to accelerated payments under the contract. No contractual permission suggests any measure of damages, although the contract clearly contemplates that plaintiff is entitled to deferred compensation, beginning in 1983, either upon the successful conclusion of his employment or if he is fired. There is an element of uncertainty in this bargain, however, which the Court must conclude was anticipated by the parties. Mr. or Mrs. Horstmyer must be alive in 1983 to collect the compensation. The thing of value, or contractual right, that plaintiffs allegedly own here, is analogous to a destructible contingent remainder. Plaintiffs seem to claim here, to continue the analogy, that because defendant has stated that he will not permit this remainder to vest, that plaintiff is entitled to its market value now.

Plaintiffs have cited a number of cases that treat the circumstances of an employer's apparent repudiation of a

pension contract. What is missing in the fact of these cases is the element of continuancy found here. In those cases the obligor was indeed already bound to pay, and the future payments were in addition to payments already owed.

While plaintiff does contend that he is owed one day's wages, the Court must conclude that this term of the contract is severable and that this past due obligation cannot provide leverage for plaintiff to make out a case of anticipatory repudiation.

Defendant cites Jay Q. Abbott versus International Harvester Co., 36 Erie County L.J. 271 (Erie CCP 1951), which in turn cites the Restatement for the proposition that because this is a unilateral contract, i.e., nothing remains but defendant's performance, the doctrine does not apply.

Plaintiff responds that he is still bound by the non-competition clauses of the March 1 agreement, and because he is still under an obligation to perform under the agreement, that the contract continues as one containing "mutual and interdependent obligations yet to be fulfilled." Abbott at 275.

Even accepting plaintiff's argument about the bilateral nature of the contract, the Court is still faced with the contingent aspect of the contract. Plaintiff cannot quantify his damages now—at least not with an argument based on contract law.

The Court is not unaware of a possible dimunition of value in the contractual rights that plaintiff now claims to hold. There may indeed be some increased risk injected into the value of the contract. To return to the analogy of the contingent remainder, the uncertainty of contingency is now compounded by the uncertainty regarding the validity of the remainder. If this were a remainder interest, its market value would surely be affected.

It was for cases just such as this one that the Declaratory Judgment Act was enacted by Congress. If there is an actual case and controversy here, plaintiff should be entitled to sue for a declaration of his rights. See Wright, Handbook of the Law of Federal Courts, 497 (3rd edition, 1976) discussing 28 USC, Section 2201 and 2202.

In sum, the Court concludes that at least as to the claimed damages based on nonpayment of deferred compensation, plaintiffs' claim cannot be brought in its current procedural form. Had the Complaint been brought under the Declaratory Judgment Act the circumstances and considerations would be altogether different.

In light of the above, the Court will order the following:

(1) Defendants' Motion for Summary Judgment on the issue of deferred compensation will be granted without prejudice to plaintiffs' right to renew their claim when it becomes ripe on November 13, 1983.

(2) The Court will grant plaintiffs' leave to amend their Complaint to afford them an opportunity to state a cause of action in compliance with the provisions of the Declaratory Judgment Act within 10 days.

Plaintiffs are directed to include therein specific claims for any present damages which they claim, such as lost wages or reimbursement of expenses, if any.

(3) Defendants shall have 10 days from the filing of said amended Complaint in which to answer.

(4) Because the Court finds that adequate time has been available for discovery, that extensive additional discovery is unnecessary, and that discovery to date has been burdensome to plaintiff in contravention of the intended functioning of the Federal Rules, discovery will be allowed for 20 days following the filing of defendants' answer, under the following terms:

(a) All additional discovery must relate to issues raised by the Amended Complaint. Duplicative discovery will not be permitted.

(b) Each discovery request must be approved by this Court.

(c) Each request for additional discovery must show in an attached memorandum why it is necessary at this stage of the proceedings and in what way it explores new issues raised by the Amended Complaint.

(d) Responses and oppositions to discovery requests shall be filed within two days of service of each request to which they pertain.

Five. Defendants are ordered to produce documents upon which they rely for proof of damages asserted in their counterclaims within five days of this order.

Plaintiffs' Motion to Regulate Proof at Trial is denied.

Plaintiffs' Motion to Quash Subpoena is hereby dismissed as moot in view of the within order.

Six. Counsel shall comply with local Rule of Procedure 21 and this Court's Standard Pretrial Procedure, which is set forth in a memorandum which may be obtained at chambers.

Seven. Trial shall be scheduled to be held on March 2, 1981.

And it is so ordered.

For counsel's information, a written copy of this memorandum and order, bench order will be filed and will be available later today.

Is there anything further?

MR. GRIFFIN: No, your Honor.

MR. ELLIOTT: No, your Honor.

THE COURT: Very well.

Reported by Russel T. Harris, Jr.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. 80-3443

HORSTMYER

v.

ARTHUR TREACHER'S FISH & CHIPS

ORDER

Before: JUDGE CLARENCE C. NEWCOMER

AND NOW, this 15th day of January, 1981, it is ORDERED that the above captioned case is scheduled for a *Non-Jury Trial for Monday, March 2, 1981 at 9:30 A.M. in Courtroom 13A.*

Trial time—2 days

CC: FRANK H. GRIFFIN, III, 3400 Centre Square West, 1500 Market St., Phila., Pa. 19102

JOHN M. ELLIOTT and STEVEN C. BRAVERMAN, 2600 Fidelity Bldg., Phila. 19

ATTEST:

By: NATALIE Z. NAKOVICK
Deputy Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 80-3443

KENNETH L. HORSTMYER
and MADELEINE S. HORSTMYER

v.

ARTHUR TREACHER'S FISH & CHIPS, INC. and
MRS. PAUL'S KITCHENS, INC.

MEMORANDUM AND ORDER

(FILED FEB. 19, 1981)

NEWCOMER, *J.* February 12, 1981.

Defendants move to dismiss this action, on the bases that plaintiff's declaratory judgment request does not present an actual case or controversy, and that the breach of contract claims are moot.

Plaintiffs sued in September 1980, alleging that defendants had repudiated the deferred compensation provisions of Kenneth Horstmyer's employment contract.[1] Defendants have counterclaimed for fraud, breach of fiduciary duty, and defamation. In January, 1981, this Court granted defendants' Motion for Summary Judgment on the issue of plaintiffs' present right to damages, holding that the doctrine of anticipatory repudiation did not apply in this case. The Court did, however, permit plaintiffs to proceed with a request for declaratory judgment, and

1. Under the terms of the contract, Madeleine Horstmyer is a beneficiary of the compensation agreement, entitled to a yearly payment for life if she survives her husband.

for other damages incidental to the alleged breach of the employment contract.

1. THE DECLARATORY JUDGMENT REQUEST.

The Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, permits a federal court to give declaratory relief only in a case of actual controversy. Defendants' argument appears to be threefold. First, they state, the "claim is remote and hypothetical, and cannot present a justiciable case or controversy." Second, "under Pennsylvania law plaintiffs' claim does not assert a present right or create an immediate controversy authorizing declaratory relief." Third, because "the relief requested is inconsistent with the purposes underlying the Declaratory Judgment Act . . . [g]ranting plaintiffs' request for declaratory relief would amount to nothing more than a costly academic exercise which unjustly rewards plaintiffs for their race to the courthouse."

The most significant of defendants' arguments is the first. It claims that the case is beyond the constitutional and statutory limits of this Court's jurisdiction. As the Court suggested in its ruling of January 15, 1981, the case here seems to be practically identical to the prototypical declaratory judgment situation described in Professor Wright's text on Federal Courts, where the payee of a repudiated promissary note had, before 1934,

> to wait until payment was due before appealing to the courts. It might well have been important for him to ascertain in advance whether the note was a binding obligation and whether he might rely on it and list it among his assets. . . .

* * * *

> In [this situation] the declaratory judgment procedure provides a useful solution. It creates a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached a stage at which either party may seek a coercive remedy.

Wright, Handbook of the Law of Federal Courts 497-98 (3d ed.)

Defendants cite *Aetna Life Insurance Co. v. Haworth*, 300 U.S. (1937) as one of the Supreme Court's elucidations of the "case or controversy" requirement, and indeed that case is instructive. In Aetna plaintiff, an insurance company, alleged that defendant's claims for insurance proceeds were invalid, and that defendant's failure to institute an action deprived plaintiff of an opportunity to prove the invalidity of the insurance claims. Plaintiff argued it was prejudiced by the "danger that it may lose the benefit of evidence through disappearance, illness or death of witnesses" and by its obligation to retain a reserve fund for the eventuality that defendant might prevail. *Aetna*, 300 U.S. at 239. The Horstmyers face similar prejudice here. First, the parties, while taking adverse positions with respect to their existing obligations, are now in a better position to prove the validity of plaintiffs' claims than they will be in 1983. The issues relating to Kenneth Horstmyer's "termination" require a factual determination of whether or not he was fired. The witnesses to the event are available now, as are the witnesses who can testify to the claim of plaintiff's alleged fraud in the inducement of the contract and they should be heard. Second, plaintiffs are in a similar position to Aetna's in that they are confronted with considerable financial uncertainty. Although they will not be required to set aside a reserve fund, an identical sort of insecurity has been in-

troduced into their financial planning. The retirement benefits upon which they might wish to rely are jeopardized. In *Aetna* the Court held that a declaratory judgment action would lie. That case compells the same result here.

Defendants argument that plaintiffs' claim is too contingent and therefore not an actual case or controversy rests on the nature of the deferred compensation provision, *i.e.*, that plaintiffs must survive till 1983 to collect anything. In *Bird v. Computer Technology, Inc.*, 364 F. Supp. 1336 (S.D.N.Y. 1973) the plaintiffs claimed that pension benefits, apparently equally contingent as plaintiffs', had been repudiated. Indeed, in *Bird* the plaintiffs could expect payment, if they survived, only 28 years after the court's decision to enter declaratory judgment. Judge Gurfein dismissed claims for damages, but permitted a declaratory judgment action. In proceeding to an identical result, the Court concludes that the possibility that defendants may never be called upon to fulfill their contractual obligations, should they be proven enforceable, is not a reason to deny plaintiffs the opportunity to obtain a declaratory judgment. The controversy over the validity of the contract and the circumstances of the termination of Kenneth Horstmyer's employment is an actual, present one, and, indeed, might seem to be the paradigmatic declaratory judgment case.

Defendants' third argument is similar to their first, and this Court's treatment of the first argument pertains. Defendants' second argument, even if based on an accurate interpretation of Pennsylvania law, is not compelling. The fact that Pennsylvania courts might not permit a declaratory judgment in this case does not bind this Court. Unless defendants are, *sub silentio*, making an argument based on considerations of federalism, the procedures available in Pennsylvania courts are irrelevant.

2. Breach of Contract and Continuing Obligations

On January 20, 1981, counsel for defendants sent a letter to plaintiffs' counsel with a check for $295.17. The letter states that Kenneth Horstmyer is released from any remaining contractual obligation not to compete with Arthur Treachers. The check was described as representing the one day's wages claimed in the amended complaint. The letter expressly limits the terms of the release and payment by disclaiming any admission that Kenneth Horstmyer was not paid for his last day of employment "or that he is entitled to any payment."

Plaintiffs respond that defendants have not demonstrated the method of calculating the amount, that they are entitled to attorneys fees under Pennsylvania law, and that the release is invalid under paragraph eight of the Contract. Accordingly, plaintiffs report that the check has not been cashed, and the claim is not moot.

As it appears that there are material facts in dispute regarding the contractual obligations of both parties, and the measure of unpaid wages and incidental moneys, if any, that are owed, defendants motion to dismiss these elements of the action will be denied.

/s/ Clarence C. Newcomer
Clarence C. Newcomer, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 80-3443

KENNETH L. HORSTMYER and
MADELEINE S. HORSTMYER

v.

ARTHUR TREACHER'S FISH & CHIPS, INC.

and

MRS. PAUL'S KITCHENS, INC.

ORDER

AND NOW, to wit, this 12th day of February, 1981, upon consideration of defendants Motion to Dismiss, it is hereby Ordered that said Motion is DENIED.

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 80-3443

KENNETH L. HORSTMYER and
MADELEINE S. HORSTMYER

v.

ARTHUR TREACHER'S FISH & CHIPS, INC. and
MRS. PAUL'S KITCHENS, INC.

ORDER

(Filed March 12, 1981)

AND NOW, to wit, this 11th day of March, 1981, it is hereby DECLARED that the letter agreement of March 2, 1980 among Arthur Treacher's, Mrs. Paul's, and Kenneth Horstmyer is valid, subsisting, and binding on the parties.

It is further ORDERED that, consistent with the memorandum opinion read from the bench today, judgment is hereby entered for plaintiffs and against defendants on Count II and Count III of the Amended Complaint, except insofar as plaintiffs request a declaration that Mr. Horstmyer is no longer bound by the covenant not to compete. Judgment is entered in favor of plaintiffs and against defendants in the amount of $295.17, and interest at 6% from July 30, 1980 to this date.

Judgment is entered for plaintiffs and against defendants on all of defendants' counterclaims.

AND IT IS SO ORDERED.

/s/ CLARENCE C. NEWCOMER
Clarence C. Newcomer, *J.*

3/12/81 to:

F. H. Griffin III Esq.
J. M. Elliott Esq.

BENCH OPINION

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 80-3443

KENNETH L. HORSTMYER and
MADELEINE S. HORSTMYER

v.

ARTHUR TREACHER'S FISH & CHIPS, INC. and
MRS. PAUL'S KITCHENS, INC.

Philadelphia, Pa., March 11, 1981

BEFORE: HON. CLARENCE C. NEWCOMER, *J.*

BENCH OPINION

Reported by:
Russell T. Harris, Jr.

APPEARANCES:

FRANK H. GRIFFIN, III, ESQ.
PAUL J. BERNARDO, ESQ.
and
GORDON W. GERBER, ESQ.,
Attorneys for Plaintiffs.

JOHN M. ELLIOTT, ESQ.,
CONSTANCE FOSTER, ESQ.,
and
WILLIAM C. FIELDS, ESQ.,
Attorneys for Defendants.

THE COURT: First, I want to acknowledge to counsel, if I may, the receipt of your deposition designations, counter-designations, and objections to the same by the opposing parties. They have all been read and considered and they have all been admitted. That means the objections were overruled as to each one.

The Court is now prepared to present its findings of fact and conclusions of law in connection with this case. It has been prepared by the Court as a Bench Memorandum and is therefore in longhand and cut and pasted together, not in form so that I can give you each a copy, but of course it will be in the record and in due course if you wish a copy it will be available. The Order, however, which will be entered at the end, we will prepare copies of that so you may obtain that.

FINDINGS OF FACT:

1. Plaintiffs, Kenneth L. Horstmyer ("Mr. Horstmyer") and Madeleine S. Horstmyer ("Mrs. Horstmyer"), are individuals, husband and wife, citizens of the State of New Jersey. They reside at 1239 Charleston Road, Cherry Hill, New Jersey, 08034.

2. Defendant, Arthur Treacher's Fish & Chips, Inc. ("Treacher's") is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the Commonwealth of Pennsylvania and its main offices at 5501 Tabor Road, Philadelphia, Pa., 19120. Arthur Treacher's is a wholly-owned and controlled subsidiary of defendant Mrs. Paul's Kitchens, Inc.

3. Defendant, Mrs. Paul's Kitchens, Inc. ("Mrs. Paul's") is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal place of business in the Commonwealth of Pennsylvania and its main offices at 5830 Henry Avenue, Philadelphia, Pa. 19128.

4. Defendant Treacher's is engaged in both the operation and the franchising of Arthur Treacher's Restaurants —fast food retail restaurants specializing in the sale of seafood.

5. At the time Mrs. Paul's acquired Treacher's, Treacher's was in poor financial condition, and a minority of franchisees were paying their contractual royalties. When Mr. Horstmyer was hired, approximately 26 percent of franchisees were paying their royalties.

6. In January 1980, Treacher's was managed by a team of executives headed by Edward Piszek, Jr. and Richard Baker, both of whom were officers of Mrs. Paul's, and both of whom reported to the Chairman of Treacher's and Mrs. Paul's, Edward Piszek, Sr.

7. In January 1980, Treacher's began looking for an executive with experience in franchised fast-food operations to run the company. Louis Fischer, President of Gino's, a franchised fast-food chain, recommended Mr. Horstmyer.

8. Mr. Horstmyer is an experienced executive whose credentials appeared from his resume to satisfy Treacher's requirements. His resume lists his prior employment. In particular, his resume reveals his past employment with Bonanza International Incorporated ("Bonanza"), and the fact that Bonanza withdrew from the restaurant operation business during Mr. Horstmyer's tenure. The resume does not reveal that Mr. Horstmyer had retained his contractual guarantee of deferred compensation. Neither does the resume reveal that the Termination Agreement of June 27, 1979 between Mr. Horstmyer and Bonanza (Defendant's Exhibit-7) stated "Horstmyer was discharged by the company effective as of June 27, 1979." Specific reference is made in that sentence of the Termination Agreement to Article Six, paragraph 6.02 of the Employment Contract

between Mr. Horstmyer and Bonanza (Defendant's Exhibit-3), which states in part that, "In the event that [Horstmyer] is discharged for any reason by [Bonanza] . . . this action will not disqualify him for [retirement benefits]."

The Court finds as fact that Mr. Horstmyer was "discharged" by Bonanza in order to guarantee that his deferred compensation would be considered "retirement income" for tax purposes, and that the use of the term "discharge" is not an indication of poor performance by Mr. Horstmyer or dissatisfaction on the part of Bonanza.

The Court further finds that Mr. Horstmyer is guaranteed $50,000 per year, beginning in 1933, as deferred compensation. Under the terms of the Termination Agreement, in paragraph 4, Mr. Horstmyer is obligated to be available to provide consulting services to Bonanza until 1983. The Court finds that Mr. Horstmyer never performed any consulting services after his employment with Bonanza was terminated.

9. Early in 1980 Mr. Horstmyer was contacted by Richard Baker and asked to travel to Philadelphia to meet with him and Edward Piszek, Jr. At the time Mr. Horstmyer was not working, although he was actively engaged in negotiations with a large British food company. Mr. Horstmyer withdrew from those negotiations when he was offered the presidency of Treacher's.

10. Mr. Horstmyer, Edward Piszek, Jr. and Mr. Baker negotiated the terms of his employment contract with Treacher's. Mr. Horstmyer refused to accept the position on the basis of a performance bonus plan, stating that he was more interested in providing for his retirement and for his wife. He informed Treacher's that he desired a deferred compensation agreement that would provide a secure retirement income for himself and for Mrs. Horst-

myer, and that his current financial situation provided only a meager retirement income. Mr. Horstmyer met with Edward Piszek, Sr., who agreed to Mr. Horstmyer's demands.

11. Mrs. Paul's corporate counsel prepared a letter agreement that was revised by Mr. Horstmyer's lawyer, and, in its final form, signed by Mr. Horstmyer and Edward Piszek, Sr.

12. Paragraph 4 of the Agreement states as follows:

> "Following the Initial Term and at such time as your Regular Employment (as provided for in paragraph 2 above) ceases, Treacher's agrees to pay you, by way of Deferred Compensation, amounts totalling Fifty-Thousand ($50,000.00) Dollars per year, payable bi-weekly. The fees provided for in this Paragraph 4 shall continue for and during your life time and that of your spouse, Mrs. Madeleine Horstmyer, should she survive you. Mrs. Paul's Kitchen's, Inc. hereby guarantees all such Deferred Compensation amounts provided for in this Paragraph 4."

Paragraph 5 of the Agreement states:

> "Either party may terminate the Regular Employment provided for under this letter at any time. In the event you voluntarily terminate such Regular Employment before November 13, 1983, [Mr. Horstmyer's 62nd birthday], you shall not be entitled to any further salary as provided for in Paragraph 4 of this letter. In the event your Regular Employment provided for under this letter is terminated by us . . . you shall (or in the event of your death Madeleine S. Horstmyer shall) be entitled to receive those Deferred Compensation payments provided for in Paragraph 4 above."

Paragraph 6 of the Agreement states in part,

"You further agree that during the initial term and for two . . . years thereafter, you will not enter into the employ of any person, firm or corporation engaged in competition with Treacher's. The term 'engaged in competition,' shall mean engaged in the fast-food retail restaurant business, specializing in the sale of seafood."

Paragraph 8 of the Agreement states:

"This Agreement supersedes all prior understandings between us and may not be changed or terminated orally, but only by a writing signed by the parties hereto."

13. Mr. Horstmyer became President of Treacher's in March of 1980. He understood it to be a primary responsibility of his to revive the profitability of the company by "turning on" the stream of royalty payments from the franchisees.

14. After he was hired, Mr. Horstmyer investigated the franchisee situation, meeting with Treacher's franchisees whom he knew from previous association during his employment with Burger King, and with a franchisee, Mr. Benefield, who was suggested by Mr. Piszek. Mr. Horstmyer found that the franchisees, who were initially delighted by the acquisition of Treacher's by Mrs. Paul's, were unwilling to pay back royalties, or to resume royalty payments until Treacher's resumed performing franchisor services.

15. Mr. Horstmyer also found that a substantial portion of Treacher's franchisees were organized into the Arthur Treacher's Franchisee Association. Mr. Horstmyer met with the Board of Directors of that Association on March 12, 1980 in Chicago.

16. Mr. Horstmyer embarked immediately on a course of negotiation with the franchisees, focusing his attention and theirs on the resumption of royalty payments. Several aspects of this negotiation period are clear.

First, Mr. Horstmyer insisted at all times that Treacher's was entitled to 4 percent royalties.

Second, Mr. Horstmyer considered the resumption of full royalties impossible until Treacher's revived its services to franchisees.

Third, Mr. Horstmyer's negotiating technique with the franchisees was to defer negotiations about the past-due royalties until after royalty payments had started up again.

Fifth, the so-called "2-2-2" plan was a temporary accommodation designed to break the impasse in negotiations.

17. During the period before his termination, Mr. Horstmyer met approximately fortnightly with Messrs. Richard Baker and Edward Piszek, Jr. to keep them informed and to take direction. Mr. Piszek, Jr. stated in his testimony that he was and has been since March 1980 the Chief Executive Officer of Treacher's.

18. The "2-2-2" plan was as follows: The franchisees would honor their obligation to pay four percent in royalties to Treacher's. Treacher's in turn would agree to plow back two percent into local advertising, on a matching basis with the franchisees.

19. Neither Mr. Baker nor Mr. Piszek, Jr. to this day understand the elements of the "2-2-2" plan. What this may indicate about their stewardship of Treacher's is irrelevant. What it does indicate is that Mr. Piszek, Sr. was never informed about the nature of the negotiations with the franchisees by those to whom Mr. Horstmyer was responsible to report.

20. All reports at Mrs. Paul's and Treacher's are made verbally, "eyeball-to-eyeball" and it is firm company policy not to use written reports or memoranda. It is the further policy of the companies not to employ a budget in connection with their financial matters.

21. Mr. Horstmyer's contact with Mr. Piszek, Sr. during the period after his hiring was minimal. Initially, Mr. Horstmyer was told that he was to run the company with total operational authority, with the understanding that he was to turn the company around in as short a time as possible. Mr. Horstmyer's next meeting with Mr. Piszek, Sr. was solicited by Mr. Horstmyer.

22. From his meetings with franchisees, Mr. Horstmyer had learned of two immediate franchisee complaints: First, that the usual suppliers of cod, Icelandic and Coldwater, had been terminated or disapproved for franchisees by Treacher's; and, second, that a fishcake, reportedly from a Polish fleet, and referred to as the "abominable fishcake," was being sold through company-owned stores. Mr. Horstmyer discovered through contacts in the industry that there was considerable animosity between the cod suppliers and the new owners of Treacher's.

23. At his second meeting with Mr. Piszek, Sr., on a Sunday in March, and at Mr. Piszek's home, Mr. Horstmyer succeeded in persuading Mr. Piszek to reverse his decision to cut off the two cod suppliers, and to remove the objectionable fishcake from the company stores.

24. Mr. Horstmyer next saw Mr. Piszek, Sr. at the end of May at Mrs. Paul's headquarters. The meeting was fortuitous and casual, and Mr. Horstmyer was given assurances of Mr. Piszek, Sr.'s support.

25. When Mr. Horstmyer joined Treacher's, franchisor services had dwindled to a minimum. The advertis-

ing contract for Treacher's had been cancelled and no successor agency had been selected. The marketing department had effectively disappeared, expect for one woman who dispensed materials to franchisees. The number of regional representatives had fallen to three. The three were supposed to supervise 600 stores. Apparently many stores were simply not visited or contacted at all.

26. Mr. Horstmyer's efforts to reorganize Treacher's were strenuous. His calendar and his testimony reveal a pattern of very hard work, travel, knowledgeable organization, and a firm plan by which he intended to turn the company around. By contrast, the Chief Executive Office and the Executive Vice President of Treacher's namely, Mr. Piszek, Jr. and Mr. Baker, keep no files, do not communicate in writing, and, indeed, do not even produce a budget for Treacher's. Despite Mr. Horstmyer's efforts to develop a budget for planning purposes, there is no evidence that a final budget was ever developed.

27. During the period of March to June of 1980, Mr. Horstmyer regularly reported the progress of his negotiations with franchisees and the reorganization of the company to Messrs. Baker and Piszek, Jr. At that time, Mr. Horstmyer believed that the essence of his reports was passed on to Mr. Piszek, Sr. It was in this system of communication that the initial conflict arose.

It is quite clear that the Boards of Mrs. Paul's and Treachers expected Mr. Horstmyer to get the royalty payments started up again. It is equally clear that this was the main focus of his efforts. Mr. Piszek, Jr. and Mr. Baker have testified that they *meant* payment of back-royalties as well as ongoing royalties. Mr. Horstmyer, it is clear, never considered the issue of back royalties the paramount concern, although he knew that back royalties would have to be paid in some form, at some point. It

is this distinction, which was clear to both Mr. Horstmyer and the franchisees, that eluded Messrs. Baker and Piszek, Jr. Clearly, the Chairman of the Board could not have learned of Mr. Horstmyer's evaluations or progress when there was such a fundamental misunderstanding among Messrs. Horstmyer, Piszek, Jr. and Baker.

28. On June 16, 1980, Mr. Piszek, Sr. appeared at a meeting among Messrs. Horstmyer, Piszek, Jr. and Baker, which was scheduled as one of the regular fortnightly meetings. Mr. Piszek, Sr. announced that the new policy of Treacher's was "to litigate the franchisees" for past royalties. Mr. Horstmyer protested that a successful conclusion of negotiations was imminent, but Mr. Piszek, insisted that the new policy be implemented. Mr. Horstmyer agreed to carry out the new policy.

29. On June 29, 1980 Mr. Horstmyer wrote to Mr. Piszek, Sr. soliciting direction and advice and expressing a desire to "do a great job" for Mr. Piszek, Sr. Mr. Piszek, did not respond.

30. On July 1, 1980, Mr. Horstmyer wrote a long memorandum to Mr. Piszek, Sr., describing what he perceived to be the failures of communication between Mr. Horstmyer and Mr. Piszek, Sr. Mr. Piszek did not respond.

31. On July 7, 1980, Mr. Horstmyer sent another long memorandum to Mr. Piszek in which he again urged Mr. Piszek to abandon the course taken, or, to sell Treacher's. It was Mr. Horstmyer's advice that litigation with the franchisees would destroy the business.

32. During the period after June 16, and after collection letters were sent to franchisees by Treacher's legal staff, Mr. Horstmyer was called by several franchisees about the company's policy. Mr. Horstmyer told them

that the decision to litigate had been made by the Chairman, and that he, Mr. Horstmyer, still hoped to dissuade the Chairman from taking that course.

33. After the June 16, 1980 meeting, Mr. Horstmyer was ordered to discontinue his negotiations about royalties, or any accommodation of back royalties. He did so.

34. On July 31, 1980, Mr. Horstmyer met with Mr. Baker, Mr. Piszek, Jr., and Mr. William Fields, corporate counsel to Mrs. Paul's. At that meeting Mr. Horstmyer was fired. He was told that Mrs. Paul's and Treacher's had no further obligation under his employment contract and that he was not to return to his office unless accompanied by a Mrs. Paul's lawyer at the end of the day.

35. Mr. Horstmyer was not paid for his last day at work. A check in the amount of $295.17 was tendered to Mr. Horstmyer's counsel, but it was not cashed or accepted as payment because the amount was disputed and because the accompanying letter purported to release Mr. Horstmyer from his obligations under the contract.

35. Mr. Horstmyer earned, in gross, $384.62 on his last day. Defendants calculate that, after statutorily required withholding, Mr. Horstmyer was entitled to be paid $295.17. Mr. Horstmyer suggests that because he was only paid approximately $46,000 in 1981, and that the withholding rate contemplated a salary of $100,000.00, that the withholding rate is incorrect. Even if the Court were to accept this idea, plaintiff has offered no alternative figure, and the Court will decline to do the calculation required. Therefore, the Court finds that Mr. Horstmyer is entitled to the sum of $295.17. Tender of payment by check was ineffective because it was accompanied by conditions which the plaintiff was not obligated to accept.

37. After having been fired by Treacher's, Mr. Horstmyer revised his resume and distributed it. The resume reads in relevant part:

"March 1980 to August 1980:

"President-Arthur Treacher's Seafood, Inc. Philadelphia, Penna. During five months in the operation, completely restaffed personnel from zero to a going business. Appointed an advertising agency and a sales promotion agency. Negotiated royalty arrears payments with the franchisee association. Owner reversed strategy and is now suing franchisees. Goodwill lost, system headed for demise. Fired for not concurring with litigation as solution to dilemma."

38. The cover letter sent with several of these resumes reads in part as follows:

"My latest involvement with Arthur Treacher's Seafood has come to an end. After a few months of rebuilding the organization, the owner has decided to sue the franchisees—principally for back royalties. Instead, we were negotiating for an amenable agreement to preserve the system and start the business rolling again.

"When the owner reversed the strategy, there was no interest on my part to preside over massive litigation that could last beyond the number of years I want to work."

39. On October 21, 1980, Mr. Horstmyer met with William Condren, an investment banker, and two franchisees of Treacher's, in the office of Mr. Horstmyer's counsel. Condren thought Mr. Horstmyer's judgment about the viability of Treacher's because he represented parties who might be willing to buy the system. Condren

already had some information about Treacher's which he obtained when Treacher's was still a public company.

Mr. Horstmyer did not reveal any inside information or secrets during the meeting. Instead he gave opinions about how the company could be resurrected. Condren inquired whether Mr. Horstmyer would be available for employment, should Treacher's be purchased. He did not offer Mr. Horstmyer a job.

40. The Court includes with these findings of fact, the following observations about the testimony of the witnesses:

It is clear from the testimony of Mr. Horstmyer that he is an intelligent and experienced executive. His credentials are excellent, and his demeanor convinces this Court that he was an honest witness and an extremely capable man. Much has been made of his "discharge" from his previous employment, but a review of the evidence reveals quite clearly (1) that Bonanza closed its company stores for financial reasons, chief among them under-capitalization; (2) that the term "discharge" was used for tax purposes; and (3) that Bonanza personnel considered Mr. Horstmyer both competent and honest.

The testimony of Messrs. Baker and Piszek, Jr. does not reflect so favorably upon them. The Court does not suggest that their testimony is not truthful. Instead, their testimony raises substantial doubt as to their diligence, competence, and as to the accuracy of their perceptions.

Mr. Baker is a man with 28 years of experience with the FBI, including a period of service as Regional Director for the Philadelphia area. Yet, despite his long experience in investigatory work, his research of Mr. Horstmyer's background and references consisted of one phone call to a man whose name he has forgotten and whom he never knew, at Burger King. The man was suggested by Louis Fischer, President of Gino's.

Similarly, neither Baker nor Piszek, Jr. understood the "2-2-2" concept. Whether or not they approved of it, the fact that they do not to this day understand it raises substantial question about their attention to business at Treacher's.

Similarly, their interpretation of facts is incomprehensible. They interpret a memorandum of Mr. Horstmyer's as a "letter of resignation," when under no circumstances could a rational construction of that memorandum (Plaintiff's Exhibit-4) support the inference that the writer is resigning.

Along the same lines, Mr. Baker reports that Mr. Horstmyer, when questioned about his "resignation" memo specifically said, "I couldn't afford to do that." The conclusion Mr. Baker seems to reach is that Mr. Horstmyer was unfairly and unjustly holding on in order to be fired, thus securing his retirement benefits. Even if there were evidence on the record to support this suggestion, it remains illogical. In light of the clear terms of the employment contract, the response reportedly given by Mr. Horstmyer would be the only intelligent one to make, and one which he would be entitled to make.

41. Mrs. Horstmyer owns, through a corporate interest, an Arby's-franchised store in Florida. Mr. Horstmyer has been involved in the management of that investment. Arby's is a franchise chain of fast-food restaurants specializing in roast beef sandwiches.

42. Edward Piszek, Sr., Chairman of the Board of Treacher's and Mrs. Paul's, owns a substantial part of Gino's. Gino's is the franchisor of a chain of fast-food restaurants specializing in hamburgers.

CONCLUSIONS OF LAW:

I. Jurisdiction.

This Court has already noted that an "actual case or controversy" sufficient to meet the jurisdictional require-

ments of Article III of the Constitution and the Declaratory Judgment Act exist in this case. The testimony adduced at trial merely reinforces that conclusion.

Mr. Horstmyer is still unemployed. If the contract upon which he seeks declaratory relief is judged valid, he will be able to assign it for value or borrow against it until his retirement benefits under other contracts accrue. Thus, this is a very real case which must be decided now.

II. Plaintiff's Claims.

A. *Declaratory Judgment.*

The Court has read the pertinent parts of the contract in dispute. It is clear and unambiguous. Mrs. Paul's and Treacher's are obliged to pay Mr. Horstmyer $50,000 per year, on prescribed terms after November 13, 1983, until death, and, should Mrs. Horstmyer survive him, she is entitled to $50,000 per year until her death.

Defendants raise several defenses to plaintiffs' request that the contract be declared valid. First, they allege that Mr. Horstmyer was not fired, that he resigned, and that he is therefore not entitled to deferred compensation under the contract. The Court has found as a fact that Mr. Horstmyer was fired. This defense therefore fails.

Defendants also raise the defense of the fraudulent inducement, alleging that misrepresentations by Mr. Horstmyer induced Treacher's and Mrs. Paul's to enter into an agreement which they otherwise would not have done had they known other facts. Of misrepresentations alleged, the first is that Mr. Horstmyer was discharged from his previous employment. The Court has found that although the word "discharge" was used in Mr. Horstmyer's termination agreement, that it was not a discharge in any sense that would be relevant to any concern of Treacher's. Furthermore, Treacher's knew about Bonanza and could easily have determined anything about his

leaving Bonanza. Having concluded, however, that there was no fraudulent inducement in Mr. Horstmyer's failure to offer Treacher's the precise language of the termination agreement, the issue of inquiry notice is irrelevant.

The second misrepresentations alleged is that Mr. Horstmyer was to receive $50,000 per year in retirement benefits from Bonanza. Mr. Piszek, Jr. testified that Mr. Horstmyer told him that he had a "meager" retirement plan. The adjective "meager" is a subjective one under the circumstances, but Treacher's certainly knew that he had some retirement income from another source.

The argument that they would not have agreed to pay him retirement income had they known he already *had* some retirement income is incredible. Mr. Horstmyer insisted on deferred compensation. Had it not been offered he would not have taken the job. How much retirement income he had accumulated during his various jobs was really irrelevant, considering Mr. Horstmyer's adamant position on the subject. Because the Court cannot conclude that there was any misrepresentation, much less a material misrepresentation, in this non-disclosure, this agreement fails.

The third alleged misrepresentation regards Mr. Horstmyer's obligation to provide consulting services. Mr. Horstmyer never performed any consulting services for Bonanza, and the Court has accepted his explanation that the provision was inserted to protect the tax benefits of a deferred compensation package. Because Mr. Horstmyer never had the intention of serving two masters, this alleged misrepresentation fails as a defense.

Finally, defendants have made much of the Horstmyers' ownership of an Arby's franchise in Florida. Under the very terms of the agreement, Treacher's would not consider owning a restaurant that serves roast beef sandwiches a conflict of interest for Mr. Horstmyer. It was clearly excluded from the defi ition of "engaging in com-

petition," and cannot be considered the kind of misrepresentation the non-disclosure of which amounts to fraudulent inducement.

In sum, the Court concludes that Mr. Horstmyer made no material misrepresentations during the negotiations concerning his contract, and the contract cannot be avoided for fraud in the inducement.

Defendants also allege that Mr. Horstmyer materially breached the contract, and that as a result defendants are released from any further obligations under the contract. Defendants cannot point to any provision in the Agreement that plaintiffs can be said to have breached, and accordingly this defense also fails.

Similarly, the Court has heard no evidence to support defenses based on failure to satisfy a fiduciary duty. Counsel for defendants accuses Mr. Horstmyer of "corporate treason." While there is good evidence that Mr. Horstmyer did not immediately pursue the policy of the Chairman with enthusiasm and vigor, his conduct was hardly treasonable. Indeed, in light of his previous success in persuading the Chairman to reverse his decision regarding cod supplies, despite embittered relations between the Chairman and the cod suppliers, Mr. Horstmyer had every reason to believe that the decision to litigate was reversible.

The Court expresses no opinion about any business judgment made, and certainly the Chairman was entitled to make a decision and to have it carried out. Nevertheless, in the context of past practice and ordinary business relations, the behavior of Mr. Horstmyer cannot be considered a breach of his fiduciary duties.

Mr. Piszek, Sr. may or may not have been justified in firing Mr. Horstmyer, but there was no breach of duty to the company. Similarly, there was no fraud involved in this activity, and a defense predicated on fraud must fail.

The Court therefore concludes that the letter agreement dated March 1, 1980 entered into among Kenneth Horstmyer, Arthur Treacher's and Mrs. Paul's will be declared valid and binding on the parties. Plaintiffs' counsel having repudiated defendants' offer of a release from the non-competition clause of the agreement, the validity of the release is not now before the Court.

The Court has also found that plaintiff Kenneth Horstmyer is entitled to payment for his last day of work. For reasons explained above, the Court has determined the amount owing Mr. Horstmyer to be $295.17, with interest from July 30, 1980.

III. Defendants' Counterclaims.

Defendants' counterclaims are predicated in the main on the same allegations as were made to support their defenses to the declaratory judgment action. The Court can find no evidence satisfying defendants' burden of proof regarding breach of fiduciary duty, breach of contract, tortious interference, or common law fraud.

Defendants offer deposition testimony to prove that plaintiff incited a revolt among the franchisees, or, at any rate, that he contributed to a "metastisis." The evidence considered by this Court does not support that conclusion.

Defendants have also suggested a scheme on the part of Mr. Horstmyer to aid a franchisee takeover of Treacher's, and that in furtherance of that cause he treated a "merger-maker" from New York to secret information about Treacher's and Mrs. Paul's. The facts adduced at trial do not support this allegation.

The evidence offered to prove libel does not support the allegation. From all the testimony, the Court concludes that the putative libels were, in the main, true. Certainly there is good cause to conclude that Mr. Horstmyer believed them to be true, and that he held no malice or intent to injure defendants. The Court does not reach

the issues of privileged communication or inadequate proof of damages.

Accordingly, the Court will enter judgment for plaintiffs and against defendants on defendants' counterclaims.

IV. Attorneys Fees.

Plaintiffs' attorney has requested attorneys' fees for his efforts in recovering the one-day's wages owed Mr. Horstmyer, pursuant to 43 Pa. Con. Stat. Ann. 260.9a (f) (Purdon 1980 Supp.). No affidavits or evidence have been offered to quantify this claim. The Court will withhold judgment on this claim at this time. Plaintiffs' counsel is directed to file, within ten days, a motion and memorandum of law describing work done attributable to the recovery of Mr. Horstmyer's wages. Counsel for defendants shall reply within five days.

An appropriate order will be entered today.

ORDER

AND NOW, to wit, this 11th day of March, 1981, it is hereby DECLARED that the letter agreement of March 2, 1980 among Arthur Treacher's, Mrs. Paul's and Kenneth Horstmyer is valid, subsisting, and binding on the parties.

It is further ORDERED that, consistent with the memorandum opinion read from the bench today, judgment is hereby entered for plaintiffs and against defendants on Count II and Count III of the Amended Complaint, except insofar as plaintiffs request a declaration that Mr. Horstmyer is no longer bound by the covenant not to compete. Judgment is entered in favor of plaintiffs and against defendants in the amount of $295.17, and interest at 6% from July 30, 1980 to this date.

Judgment is entered for plaintiffs and against defendants on all of defendants' counterclaims.

AND IT IS SO ORDERED.

Is there anything further, gentlemen, ladies?

MR. GRIFFIN: I have nothing further at this time, your Honor.

MR. ELLIOTT: No. Thank you, your Honor.

THE COURT: Thank you, counsel we are adjourned.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2069 & 81-2070

KENNETH L. HORSTMYER and

MADELEINE S. HORSTMYER,

v.

ARTHUR TREACHER'S FISH & CHIPS, INC.
and
MRS. PAUL'S KITCHENS, INC.,

Arthur Treacher's Fish & Chips, Inc. and
Mrs. Paul's Kitchens, Inc.
Appellants in No. 81-2069

Kenneth L. Horstmyer and Madeleine S.
Horstmyer,
Appellants in No. 81-2070

(D. C. Civil No. 80-3443)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued February 4, 1982

Before: GIBBONS, WEIS and GARTH, *Circuit Judges*

JOHN M. ELLIOTT, ESQUIRE
CONSTANCE B. FOSTER, ESQUIRE
EDWARD S. WARDELL, ESQUIRE
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Philadelphia, Pennsylvania 19102

Attorneys for Kenneth L. Horstmyer and Madeleine S. Horstmyer

JUDGMENT ORDER

Arthur Treacher's Fish & Chips, Inc. and Mrs. Paul's Kitchens, Inc. appeal from a judgment granting Kenneth L. Horstmyer and Madeleine S. Hortsmyer a declaratory judgment that they are entitled in the future to the deferred compensation provided for in a contract between Mr. Horstmyer and Arthur Treacher's Fish & Chips, Inc. They also appeal from the dismissal of their counterclaim for damages for fraud, breach of contract and breach of fiduciary duties. The Hortsmyers' cross appeal contended that the court erred in denying recovery for the present value of deferred compensation on a theory of anticipatory repudiation. We find no error.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed. Costs to be taxed in favor of the appellee in each appeal.

By THE COURT,

/s/ JOHN J. GIBBONS
Circuit Judge

Attest

/s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk

Dated: FEB 12 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2069 and 81-2070

KENNETH L. HORSTMYER and
MADELEINE S. HORSTMYER,

v.

ARTHUR TREACHER'S FISH & CHIPS, INC.
and MRS. PAUL'S KTCHENS, INC.,

Arthur Treacher's Fish & Chips, Inc. and Mrs. Paul's Kitchens, Inc.—*Appellants in No. 81-2069*

Kenneth L. Horstmyer and Madeleine S. Hortsmyer, *Appellants in No. 81-2070*

ORDER
SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by Appellants, Arthur Treacher's Fish and Chips, Inc. and Mrs. Paul's Kitchens, Inc. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit

in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ JOHN J. GIBBONS
Judge

Dated: March 17, 1982